

CALIFORNIA OFFICE OF ADMINISTRATIVE LAW

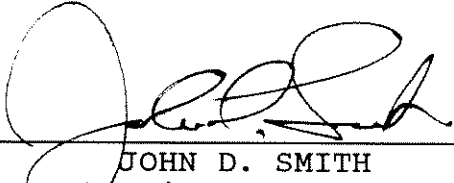
SACRAMENTO, CALIFORNIA

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IN THE OFFICE OF

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In re:	)	1989 OAL Determination	NON EU
Request for Regulatory	)		
Determination filed by	)	[Docket No. 88-003]	SECRETARY OF STATE
Michael J. Siegel, Esq.,	)		CALIFORNIA
concerning the Board of	)	January 18, 1989	
Control's policy of not	)		
granting requests for re-	)	Determination pursuant to	
consideration of denials	)	Government Code Section	
of victim restitution	)	11347.5; Title 1, Califor-	
claims in the absence of	)	nia Code of Regulations,	
new information <sup>1</sup>	)	Chapter 1, Article 1	

Determination by:

  
JOHN D. SMITH  
Chief Deputy Director/General Counsel

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SYNOPSIS

The issue presented to the Office of Administrative Law was whether the State Board of Control's policy of not granting requests for reconsideration of denials of victim restitution claims in the absence of new information is a "regulation" required to be adopted in compliance with the Administrative Procedure Act.

The Office of Administrative Law has concluded that the above noted reconsideration policy initially was a "regulation" required to be adopted pursuant to the Administrative Procedure Act. However, the Board subsequently adopted the policy pursuant to the Administrative Procedure Act as an emergency regulation, which became effective on October 1, 1988.

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THE ISSUE PRESENTED <sup>2</sup>

The Office of Administrative Law ("OAL") has been requested to determine<sup>3</sup> whether the State Board of Control's ("Board") policy of not granting requests for reconsideration of denials of victim restitution claims, unless new additional information is presented which was not available at the original hearing, is a "regulation" as defined in Government Code section 11342, subdivision (b), and therefore violates Government Code section 11347.5, subdivision (a).<sup>4</sup>

THE DECISION <sup>5,6,7,8</sup>

The Office of Administrative Law finds that the above noted reconsideration policy (1) is subject to the rulemaking requirements of the Administrative Procedure Act (APA),<sup>9</sup> (2) is a "regulation" as defined in the APA, and (3) was in violation of Government Code section 11347.5, subdivision (a), up until the time the Board adopted the policy as an emergency regulation.

I. AGENCY, AUTHORITY, APPLICABILITY OF APA; BACKGROUND

Agency

Created in 1945,<sup>10</sup> the State Board of Control is the administrative board responsible for adjudicating monetary claims filed against the State of California.<sup>11</sup> In this capacity, the Board reviews and pays claims filed under the Victims of Crime Program. The Victims of Crime Program is designed to "assist residents of the State of California in obtaining restitution for the pecuniary losses they suffer as a direct result of criminal acts. . . ." <sup>12</sup>

Authority <sup>13</sup>

Government Code section 13920 provides in part:

"By a majority vote, the board shall adopt general rules and regulations:

. . . (c) Governing the presentation and audit of claims against the state for which an appropriation has been made or for which a state fund is available. . . ."  
[Emphasis added.]

Section 13968 of the Government Code further provides in part:

"(a) The board is hereby authorized to make all needful rules and regulations consistent with the law for the purposes of carrying into effect the provisions of this article [article 1, chapter 5, part 4, title 2, sections 13959-13969.2 of the Government Code, also known as the California Victims of Violent Crimes Act]. . . ." [Emphasis added.]

Applicability of the APA to Agency's Quasi-Legislative Enactments

The APA applies to all state agencies, except those "in the judicial or legislative departments."<sup>14</sup> Since the Board is in neither the judicial nor the legislative branch of state government, we conclude that APA rulemaking requirements generally apply to the Board.<sup>15</sup>

In addition, the Board is in substance made subject to the APA by Government Code section 13968, subdivision (a), which states:

"The board is hereby authorized to make all needful rules and regulations consistent with the law for the purposes of carrying into effect the provisions of this article." [Emphasis added.]

We read the phrase "consistent with the law" to mean (among other things) that rules and regulations adopted under this section must be adopted in conformity with the law governing administrative rulemaking, i.e., the APA.<sup>16</sup>

#### General Background

To facilitate understanding of the issues presented in this Request, we will discuss pertinent statutory and regulatory provisions, as well as the undisputed facts and circumstances that have given rise to the present Determination.

In 1974, the Legislature adopted Government Code section 13959, also known as "California's Victims of Violent Crimes Act." Amended in 1982 and 1983, this statute now provides that:

"It is in the public interest to assist residents of the State of California in obtaining restitution for the pecuniary losses they suffer as a direct result of criminal acts. This article [article 1, chapter 5, part 4, title 2, sections 13959-13969.2 of the Government Code,] shall govern the procedure by which crime victims may obtain restitution through compensation from the Restitution Fund." [Emphasis added.]

Government Code section 13961, subdivision (a) provides that a victim of a crime may file an application for assistance with the State Board of Control. Government Code section 13965, subdivision (a)(5) provides that the total award to or on behalf of the victim shall not exceed twenty-three thousand dollars (\$23,000.00).

Government Code section 13964, subdivision (a) provides that after hearing evidence relevant to the application for assistance, the Board is required to approve the application if a preponderance of the evidence shows that as a direct result of the crime the victim incurred an injury which resulted in a pecuniary loss.

Government Code section 13969.1, subdivision (b) provides:

"(b) The board itself may order a reconsideration of all or part of the application for assistance on its own motion or on written request of the applicant or his representative. The board may not grant more than one such request on any application for assistance. The board shall not consider any such request filed with the board more than 30 days after the personal delivery or 60 days after the mailing of the original decision." [Emphasis added.]

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A Request for Determination was filed with OAL on April 4, 1988, by Michael J. Siegel, Attorney at Law, who represents victims and their families in applying for victim restitution. Mr. Siegel alleges that the

"board has adopted a policy of denying requests for reconsideration of denials of Victim Restitution Claims under Government Code section 13969.1(b) unless new information is provided which was not previously available and could not have been presented at the original hearing."<sup>17</sup>

Mr. Siegel included with his Request a copy of a notice of denial of a request for reconsideration that was sent to an applicant of a victim restitution claim.<sup>18</sup> The notice reads in part:

" . . . Your request for reconsideration will only be accepted if you provide relevant new information which was not previously available and could not have been presented at the original hearing." [Emphasis added.]

A second notice of denial of the applicant's request for reconsideration, after submitting new information, reads in part:<sup>19</sup>

" . . . The Board questioned the mental health evaluation submitted as 'new' information. The evaluation was dated approximately one year before the original hearing and denial of the claim. The evaluation was, therefore, available for submission prior to the original hearing. Since the request for reconsideration did not meet the guidelines set by the Board, the request was not granted." [Emphasis added.]

On September 29, 1988, the Board filed Title 2, CCR, section 649.12, subsection (h), as an emergency regulation with OAL. The emergency regulation became effective on October 1, 1988. Subsection (h) reads in part:

" . . . Requests for reconsideration [filed by applicants or their representatives in accordance with Government Code section 13969.1] shall not be granted unless the applicant produces new and additional evidence not reasonably available to the applicant at the time of the hearing. . . ."

On November 4, 1988, OAL published a summary of the Request for Determination in the California Regulatory Notice Register, along with a notice inviting public comment.<sup>20</sup>

On December 12, 1988, the Board filed a Response to the Request with OAL. In its Response, the Board disputes the Requester's contention that the reconsideration policy (the

challenged rule in this case) constitutes an "underground regulation" which must be adopted pursuant to the APA. The Response further states:

"that the Board has adopted Rule 649.12(h) (Title 2, California Code of Regulations) that reads, in part, as follows:

' . . . Requests for reconsideration shall not be granted unless the applicant produces new and additional information evidence not reasonably available to the applicant at the time of the hearing. . . . ]'

". . . Further, the Board is in the process of adopting this regulation on a permanent basis."<sup>21,22</sup> [We note that the word "information" does not actually appear in Title 2, CCR, section 649.12, subsection (h).]

As of the date of issuance of this Determination, the Board has not filed a certificate of compliance for the permanent adoption of the emergency regulation.

## II. DISPOSITIVE ISSUES

The two main issues before us are:<sup>23</sup>

- (1) WHETHER THE CHALLENGED RULE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.
- (2) WHETHER THE CHALLENGED RULE FALLS WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

FIRST, WE INQUIRE WHETHER THE CHALLENGED RULE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

In part, Government Code section 11342, subdivision (b) defines "regulation" as:

" . . . every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, . . . " [Emphasis added.]

Government Code section 11347.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in part:

" (a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . which is a regulation as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA] . . . ." [Emphasis added.]

Applying the definition of "regulation" found in Government Code section 11342, subdivision (b) involves a two-part inquiry:

First, is the challenged rule either

- o a rule or standard of general application or
- o a modification or supplement to such a rule?

Second, has the challenged rule been adopted by the agency to either

- o implement, interpret, or make specific the law enforced or administered by the agency or
- o govern the agency's procedure?

The answer to the first part of the inquiry is "yes."

For an agency rule to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.<sup>24</sup> It has, for instance, been judicially held that "rules significantly affecting the male prison population" are of "general application."<sup>25</sup> All applicants for victim compensation whose claims have been denied and who request reconsideration of their claims, are subject to, and affected by, the challenged reconsideration policy. The reconsideration policy is, therefore, a standard of general application.

The answer to the second part of the inquiry is also "yes." After focusing on whether or not the challenged rule interprets the law enforced by the Board, we will discuss whether the challenged rule governs the Board's procedure.

The Board's reconsideration policy implements the California Victims of Violent Crimes Act (sections 13959-13969.2 of the Government Code), which governs the procedures by which crime victims may apply for and receive restitution. Section 13959 provides in part:

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"This article [sections 13959-13969.2 of the Government Code] shall govern the procedure by which crime victims may obtain restitution through compensation from the Restitution Fund." [Emphasis added.]

The Board's reconsideration policy more specifically interprets and implements Government Code section 13969.1 which governs the procedures for reconsideration by the Board.<sup>26</sup> Section 13969.1 is quoted above under the subheading "General Background." Nowhere in section 13969.1 does it state that the Board will not grant a request for reconsideration unless the applicant presents new and additional information that was not available at the time of the original hearing. Clearly, this reconsideration policy interprets and implements section 13969.1, which governs the Board's reconsideration procedures.

Furthermore, the Board, in its Response to OAL, disputes the Requester's contention that the reconsideration policy "constitutes an 'underground regulation' which must be adopted pursuant to the requirements of the [APA]." However, by its rulemaking action in adopting Title 2, CCR, section 649.12, subsection (h), the Board has in substance acknowledged the regulatory nature of its reconsideration policy.

In addition to implementing the law (the Victims of Violent Crimes Act) enforced or administered by the Board, the challenged reconsideration policy also governs the Board's reconsideration procedures.

As noted above, Government Code section 11342, subdivision (b) alternatively defines "regulation" as:

" . . . every rule . . . adopted by any state agency . . . to govern its procedure . . . ." [Emphasis added.]

Also noted above, Government Code section 13969.1 sets out the procedures for the Board's issuance of a claim decision, reconsideration of a claim that was denied, and judicial review of a Board decision. The challenged policy sets out additional procedures which an applicant must comply with before the Board will grant a request for reconsideration.

Procedures are just what the Administrative Procedure Act was intended to govern--whether the procedures be rulemaking procedures or administrative hearing procedures. Therefore, the answer to the second part of the inquiry is in the affirmative, not only because the challenged rule implements the law enforced by the Board, but also because the challenged rule governs the Board's reconsideration procedures.

WE THEREFORE CONCLUDE THAT UP UNTIL OCTOBER 1, 1988, WHEN THE BOARD'S EMERGENCY REGULATION REGARDING THE CHALLENGED POLICY



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BECAME EFFECTIVE, THE BOARD'S POLICY OF NOT GRANTING REQUESTS FOR RECONSIDERATION OF DENIAL OF VICTIM'S RESTITUTION CLAIMS UNLESS NEW ADDITIONAL INFORMATION WAS AVAILABLE IS A "REGULATION" AS DEFINED IN THE APA, AND THEREFORE VIOLATED GOVERNMENT CODE SECTION 11347.5, SUBDIVISION (a).

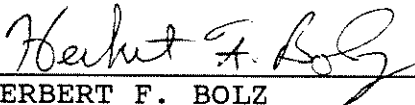
SECOND, WE INQUIRE WHETHER THE CHALLENGED RULE FALLS WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

Rules concerning certain activities of state agencies--for instance, "internal management"--are not subject to the procedural requirements of the APA.<sup>27</sup> However, none of the recognized exceptions (set out in note 27) apply to the Board's policy.

III. CONCLUSION

For the reasons set forth above, OAL concludes that the Board's reconsideration policy (1) is subject to the rulemaking requirements of the APA, (2) is a "regulation" as defined in the APA, and (3) was in violation of Government Code section 11347.5, subdivision (a), up until the Board adopted the policy as an emergency regulation.

DATE: January 18, 1988

  
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- 1 This Request for Determination was filed by Michael J. Siegel, Attorney at Law, P. O. Box 162447, Sacramento, CA 95816, (916) 395-3648. The Agency Response for the State Board of Control was signed by Austin Eaton, Executive Officer, Victims of Crime Program, P. O. Box 3036, Sacramento, CA 95812-3036, (916) 322-4426.
  
- 2 The legal background of the regulatory determination process --including a survey of governing case law--is discussed at length in note 2 to 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16; typewritten version, notes pp. 1-4. Since April 1986, the following published cases have come to our attention:

Americana Termite Company, Inc. v. Structural Pest Control Board (1988) 199 Cal.App.3d 228, 244 Cal.Rptr. 693 (court found--without reference to any of the pertinent case law precedents--that the Structural Pest Control Board's auditing selection procedures came within the internal management exception to the APA because they were "merely an internal enforcement and selection mechanism"); Association for Retarded Citizens--California v. Department of Developmental Services (1985) 38 Cal.3d 384, 396, n.5, 211 Cal.Rptr. 758, 764, n.5 (court avoided the issue of whether a DDS directive was an underground regulation, deciding instead that the directive presented "authority" and "consistency" problems); City of Santa Barbara v. California Coastal Zone Conservation Commission (1977) 75 Cal.App.3d 572, 580, 142 Cal.Rptr. 356, 361 (rejecting Commission's attempt to enforce as law a rule specifying where permit appeals must be filed--a rule appearing solely on a form not made part of the CCR); Johnston v. Department of Personnel Administration (1987) 191 Cal.App.3d 1218, 1225, 236 Cal.Rptr. 853, 857 (court found that the Department of Personnel Administration's "administrative interpretation" regarding the protest procedure for transfer of civil service employees was not promulgated in substantial compliance with the APA and therefore was not entitled to the usual deference accorded to formal agency interpretation of a statute); National Elevator Services, Inc. v. Department of Industrial Relations (1982) 136 Cal.App.3d 131, 186 Cal.Rptr. 165 (invalidating internal legal memorandum informally adopting narrow interpretation of statute enforced by DIR); Wheeler v. State Board of Forestry (1983) 144 Cal.App.3d 522, 192 Cal.Rptr. 693 (overturning Board's decision to revoke license for "gross incompetence in . . . practice" due to lack of regulation articulating standard by which to measure licen-

see's competence).

In a recent case, Wightman v. Franchise Tax Board (1988) 202 Cal.App.3d 966, 249 Cal.Rptr. 207, the court found administrative instructions promulgated by the Department of Social Services, and requirements prescribed by the Franchise Tax Board and in the State Administrative Manual--which implemented the program to intercept state income tax refunds to cover child support obligations and obligations to state agencies--constituted quasi-legislative acts that have force of law and established rules governing the matter covered. We note that the court issued its decision without any reference to either:

(1) the watershed case of Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 149 Cal.Rptr. 1, which authoritatively clarified the scope of the statutory term "regulation"; or

(2) Government Code section 11347.5.

The Wightman court found that existence of the above noted uncodified rules defeated a "denial of due process" claim. The "underground regulations" dimension of the controversy was neither briefed by the parties nor discussed by the court. [We note that on December 8, 1988, the California State Department of Social Services submitted a rulemaking file to OAL (OAL file number 88-1208-02) that contained proposed Internal Revenue Service (IRS) Tax Refund Intercept Program regulations (see Manual Policies and Procedures (MPP), sections 11-700 through 11-717, noninclusive). The file was approved and filed with the Secretary of State on January 6, 1989, to be effective March 1, 1989, as requested by the Department. These regulations will transform the ongoing IRS intercept requirements from administrative directives into formally adopted departmental regulations.]

Readers aware of additional judicial decisions concerning "underground regulations"--published or unpublished--are invited to furnish OAL with a citation to the opinion and, if unpublished, a copy. Whenever a case is cited in a regulatory determination, the citation is reflected in the Determinations Index (see note 27, infra).

- 3 Title 1, California Code of Regulations ("CCR"), (formerly known as California Administrative Code), section 121, subdivision (a), provides:

"Determination" means a finding by [OAL] as to whether a state agency rule is a "regulation," as defined in Government Code section 11342, subdivision (b), which is invalid and unenforceable unless

(1) It has been adopted as a regulation and filed with the Secretary of State pursuant to the [APA], or,

(2) It has been exempted by statute from the requirements of the [APA]." [Emphasis added.]

- 4 Government Code section 11347.5 (as amended by Stats. 1987, c. 1375, sec. 17) provides:

"(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

"(b) If the office is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is a regulation as defined in subdivision (b) of Section 11342.

"(c) The office shall do all of the following:

1. File its determination upon issuance with the Secretary of State.
2. Make its determination known to the agency, the Governor, and the Legislature.
3. Publish a summary of its determination in the California Regulatory Notice Register within 15 days of the date of issuance.
4. Make its determination available to the public and the courts.

"(d) Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published.

"(e) A determination issued by the office pursuant to this section shall not be considered by a court, or by an administrative agency in an adjudicatory proceeding if all of the following occurs:

1. The court or administrative agency proceeding involves the party that sought the determination from the office.
2. The proceeding began prior to the party's request for the office's determination.
3. At issue in the proceeding is the question of whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which is the legal basis for the adjudicatory action is a regulation as defined in subdivision (b) of Section 11342." [Emphasis added to highlight key language.]

- 5 As we have indicated elsewhere, an OAL determination pursuant to Government Code section 11347.5 is entitled to great weight in both judicial and adjudicatory administrative proceedings. See 1986 OAL Determination No. 3 (Board of Equalization, May 28, 1986, Docket No. 85-004), California Administrative Notice Register 86, No. 24-Z, June 13, 1986, p. B-22; typewritten version, pp. 7-8; Culligan Water Conditioning of Bellflower, Inc. v. State Board of Equalization (1976) 17 Cal.3d 86, 94, 130 Cal.Rptr. 321, 324-325 (interpretation of statute by agency charged with its enforcement is entitled to great weight).

The Legislature's special concern that OAL determinations be given appropriate weight in other proceedings is evidenced by the directive contained in Government Code section 11347.5, subdivision (c): "The office shall . . . make its determination available to . . . the courts." (Emphasis added.)

6 Note Concerning Comments and Responses

In general, in order to obtain full presentation of contrasting viewpoints, we encourage not only affected rulemaking agencies but also all interested parties to submit written comments on pending requests for regulatory determination. See Title 1, CCR, sections 124 and 125. The comment submitted by the affected agency is referred to as the "Response." If the affected agency concludes that part or all of the challenged rule is in fact an "underground regulation," it would be helpful, if circumstances permit, for the agency to concede that point and to permit OAL to devote its resources

to analysis of truly contested issues.

In the matter at hand, no public comments were received. On December 12, 1988, OAL received a Response to the Request for Determination from the Board. The Board's Response was considered in making this Determination.

- 7 If an uncodified agency rule is found to violate Government Code section 11347.5, subdivision (a), the rule in question may be validated by formal adoption "as a regulation" (Gov. Code sec. 11347.5, subd. (b)) (emphasis added) or by incorporation in a statutory or constitutional provision. See also California Coastal Commission v. Quanta Investment Corporation (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute.)

On the other hand, a rule found to violate section 11347.5 may simply be rescinded by the issuing agency.

- 8 Pursuant to Title 1, CCR, section 127, this Determination shall become effective on the 30th day after filing with the Secretary of State. This Determination was filed with the Secretary of State on the date shown on page 1.
- 9 We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative Law") of Division 3 of Title 2 of the Government Code, sections 11340 through 11356.
- 10 Government Code section 13900, Chapter 112, Statutes of 1945.
- 11 See Government Code sections 13901 and 13920.
- 12 See Government Code section 13959.
- 13 We discuss the affected agency's rulemaking authority (see Gov. Code, sec. 11349, subd. (b)) in the context of reviewing a Request for Determination for the purposes of exploring the context of the dispute and of attempting to ascertain whether or not the agency's rulemaking statute expressly requires APA compliance. If the affected agency should later elect to submit for OAL review a regulation proposed for inclusion in the California Code of Regulations, OAL will, pursuant to Government Code section 11349.1, subdivision (a), review the

proposed regulation in light of the APA's procedural and substantive requirements.

The APA requires all proposed regulations to meet the six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. OAL does not review alleged "underground regulations" to determine whether or not they meet the six substantive standards applicable to regulations proposed for formal adoption.

The question of whether the challenged rule would pass muster under the six substantive standards need not be decided until such a regulatory filing is submitted to us under Government Code section 11349.1, subdivision (a). At that time, the filing will be carefully reviewed to ensure that it fully complies with all applicable legal requirements.

Comments from the public are very helpful to us in our review of proposed regulations. We encourage any person who detects any sort of legal deficiency in a proposed regulation to file comments with the rulemaking agency during the 45-day public comment period. (Only persons who have formally requested notice of proposed regulatory actions from a specific rule-making agency pursuant to Government Code section 11346.4, subdivision (a)(1) will be mailed copies of that specific agency's rulemaking notices.) Such public comments may lead the rulemaking agency to modify the proposed regulation.

If review of a duly-filed public comment leads us to conclude that a regulation submitted to OAL does not in fact satisfy an APA requirement, OAL will disapprove the regulation. (Gov. Code, sec. 11349.1.)

- 14 Government Code section 11342, subdivision (a). See Government Code sections 11343; 11346. See also 27 Ops.Cal.Atty.Gen. 56, 59 (1956).
- 15 See Poschman v. Dumke (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 609.
- 16 See 1986 OAL Determination No. 4 (Board of Equalization, June 25, 1986, Docket No. 85-005), California Administrative Notice Register 86, No. 28-Z, July 11, 1986, pp. B-13--B-14, typewritten version, pp. 9-10; 1986 OAL Determination No. 10 (Department of Developmental Services, November 26, 1986, Docket No. 86-006), California Administrative Notice Register 86, No. 50-Z, December 12, 1986, pp. B-11, typewritten version, p. 3.

- 17 Request for Determination, p. 1.
- 18 See letter addressed to Norma Grinnell, representative for the applicant, Jeremy Barr, dated October 23, 1987, from the State Board of Control, Victims of Crime Unit.
- 19 This notice was also addressed to Norma Grinnell, representative for Jeremy Barr, dated January 8, 1988, from State Board of Control, Victims of Crime Program.
- 20 Register 88, No. 45-Z, p. 3578.
- 21 See Board's Response, p. 1.
- 22 The Board adopted Title 2, CCR, section 649.12, subsection (h), as an emergency regulation, effective October 1, 1988. (See California Regulatory Notice Register 88, No. 41, October 14, 1988, p. 3350.) A Certificate of Compliance must be transmitted to OAL within 120 days (January 29, 1989) or the emergency language will be repealed on January 30, 1989.

The Board argues that the adoption of emergency regulation section 649.12, subsection (h) renders the issue of this Determination moot. We are not persuaded by this argument.

At the time Mr. Siegel filed his Request for Determination the Board was implementing Government Code section 13969.1 with its policy of not granting requests for reconsideration in the absence of new additional information. The policy had not been adopted as regulation in accordance the APA requirements and therefore, at the time of the Request was in violation of the APA. Additionally, section 649.12, subsection (h) was adopted as an emergency regulation. As noted above, if the Board does not file a certificate of compliance by January 29, 1989, the language of subsection (h) will be repealed. Furthermore, even if the Board files a certificate of compliance by the deadline, subsection (h) must still comply with the six substantive standards of the rulemaking review process (see note 13, supra,) and be approved by OAL before it is permanently adopted.

For the above noted reasons, we do not agree with the Board on this point.

- 23 See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 324 (point 1); Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 174 Cal.Rptr.



- 744 (points 1 and 2); cases cited in note 2 of 1986 OAL Determination No. 1. A complete reference to this earlier Determination may be found in note 2 to today's Determination.
- 24 Roth v. Department of Veterans Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552.
- 25 Stoneham v. Rushen I (1982) 137 Cal.App.3d 729, 735, 188 Cal.Rptr. 130, 135; Stoneham v. Rushen II (1984) 156 Cal.App.3d 302, 309, 203 Cal.Rptr. 20, 24; Faunce v. Denton (1985) 167 Cal.App.3d 191, 196, 213 Cal.Rptr. 122, 125.
- 26 The Board's reconsideration policy also implements Government Code section 13968 which states in part: "(a) The board is hereby authorized to make all needful rules and regulations consistent with the law for the purposes of carrying into effect the provisions of this article." For the purpose of analysis, our discussion will be limited to Government Code section 13969.1.
- 27 The following provisions of law may permit rulemaking agencies to avoid the APA's requirements under some circumstances:
- a. Rules relating only to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (b).)
  - b. Forms prescribed by a state agency or any instructions relating to the use of the form, except where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (b).)
  - c. Rules that "[establish] or [fix] rates, prices or tariffs." (Gov. Code, sec. 11343, subd. (a)(1).)
  - d. Rules directed to a specifically named person or group of persons and which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)
  - e. Legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (b).)
  - f. Contractual provisions previously agreed to by the complaining party. City of San Joaquin v. State

Board of Equalization (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest); see Roth v. Department of Veterans Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552 (dictum); Nadler v. California Veterans Board (1984) 152 Cal.App.3d 707, 719, 199 Cal.Rptr. 546, 553 (same); but see Government Code section 11346 (no provision for non-statutory exceptions to APA requirements); see International Association of Fire Fighters v. City of San Leandro (1986) 181 Cal.App.3d 179, 182, 226 Cal.Rptr. 238, 240 (contracting party not estopped from challenging legality of "void and unenforceable" contract provision to which party had previously agreed); see Perdue v. Crocker National Bank (1985) 38 Cal.3d 913, 926, 216 Cal.Rptr. 345, 353 ("contract of adhesion" will be denied enforcement if deemed unduly oppressive or unconscionable).

The above is not intended as an exhaustive list of possible APA exceptions. Further information concerning general APA exceptions is contained in a number of previously issued OAL determinations. The quarterly Index of OAL Regulatory Determinations is a helpful guide for locating such information. (See "Administrative Procedure Act" entry, "Exceptions to APA requirements" subheading.)

The Determinations Index, as well as an order form for purchasing copies of individual determinations, is available from OAL (Attn: Kaaren Morris), 555 Capitol Mall, Suite 1290, Sacramento, CA 95814, (916) 323-6225, ATSS 8-473-6225. The price of the latest version of the Index is available upon request. Also, regulatory determinations are published every two weeks in the California Regulatory Notice Register, which is available from OAL at an annual subscription rate of \$108.

- 28 We wish to acknowledge the substantial contribution of Unit Legal Assistant Kaaren Morris in the preparation of this Determination.